NO. 20864

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN E. OELKE, LEON T. GRAVES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On June 30, 1965, the Federal Grand Jury for the Southern District of California returned an indictment in eight counts against the following defendants for the following offenses:

Count One: Against Gary Charles De Jong, Gary Lee Tronmpeter and Alan Hann Oelke, for concealment and transportation of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 2]. 1/

1/ "C. T." refers to Clerk's Transcript.

Count Two: Against Gary Lee Tronmpeter, Gary Charles De Jong and Alan Hann Oelke, for sale of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 3].

Count Three: Against Gary Lee Tronmpeter and Alan Hann Oelke, for concealment and transportation of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 4].

Count Four: Against Gary Lee Tronmpeter and Alan Hann Oelke, for sale of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 5].

Count Five: Against Alan Hann Oelke, for concealment and transportation of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 6].

Count Six: Against Alan Hann Oelke, for sale of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 7].

Count Seven: Against Leon Thais Graves, John Edward Oelke and Alan Hann Oelke, for concealment and transportation of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 8].

Count Eight: Against Alan Hann Oelke and John

Edward Oelke, for concealment and transportation of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 9].

Only Counts Seven and Eight relate to Appellant John Oelke, and only Count Seven relates to Appellant Graves.

Pursuant to pleas of not guilty by all defendants, trial by jury was set for August 2, 1965 [C. T. 33, 62]. On August 2, 1965, prior to empanelling of the jury, defendant Gary Lee Tronmpeter changed his plea to guilty. Also prior to empanelling of the jury, counsel for defendant Gary Charles De Jong moved for a severance and separate trial for his client, on the ground that Counts One and Two of the Indictment in which De Jong was charged were based upon transactions unrelated to the other Counts [R. T. 17-21]. 2/ This motion was denied without prejudice. Thereafter a jury was empanelled and sworn to try the defendants then remaining, who were Alan Oelke, Gary Charles De Jong, and appellants John Oelke and Leon T. Graves [R. T. 26-44].

Subsequent to empanelling and swearing of the jury as aforesaid, the defendant Alan Oelke changed his plea, then pleading guilty to Counts Two, Seven and Eight of the Indictment [R. T. 57]. Since the activities of Alan Oelke appeared to the Court to be the only connecting link between the offenses charged to appellants John Oelke and Graves and the offenses charged to defendant De

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2/ "R. T." refers to Reporter's Transcript.

Jong, the Court thereafter on August 3, 1965 granted De Jong's motion for a severance in the interests of justice for all defendants concerned [R. T. Supplement covering proceedings of August 3, 1965, 4-14]. The jury already impanelled was used to try defendants De Jong in a separate trial.

A second jury was then selected to try the remaining defendants, who were appellants John Oelke and Graves. This jury was empanelled and sworn on August 4, 1966, and appellants' trial by jury then commenced [R. T. 95-109].

During their trial, on August 5, 1965, appellants John Oelke and Graves waived further trial by jury [C. T. 26, 60], and the jury was excused [R. T. 118, 121]. Thereafter appellants' trial was conducted by the Court sitting without a jury. On August 31, 1965, the Court adjudged defendant Graves guilty of the offense charged in Count Seven of the Indictment [C. T. 45], and further adjudged defendant John Oelke guilty of the offense charged in Count Eight of the Indictment [C. T. 63].

On August 31, 1965, appellant Leon T. Graves was sentenced to a term of ten years, pursuant to Title 21, United States Code, Section 176a [C. T. 45]. Further, on August 31, 1965, appellant John Oelke was sentenced to a term of five years, also pursuant to Title 21, United States Code, Section 176a [C. T. 63].

Appellant Leon T. Graves filed a timely notice of appeal on August 31, 1965. Appellant John Oelke also filed a timely notice of appeal on August 31, 1965.

Jurisdiction of the District Court was based on Title 21,

United States Code, Section 176a, and on Title 18, United States Code, Section 3231.

Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294(1).

II

STATUTES INVOLVED

Title 21, United States Code, Section 176a reads as follows:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty

years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

III

QUESTIONS PRESENTED

1. Were the appellants John Oelke and Graves unlawfully placed in double-jeopardy within the contemplation of the double-jeopardy provision of the Fifth Amendment to the United United Constitution by virtue of the impanelling of two successive juries at the trial in the court below?

2. Was Government's Exhibit Number 3 in evidence at the trial below the product of an unreasonable search and seizure of appellant John Oelke's apartment at the time of the said appellant's arrest on June 16, 1965?

IV

STATEMENT OF THE FACTS

On June 10, 1966, Gordon Douglas Brucker, an informant of the Federal Bureau of Narcotics, met with Alan Oelke at a parking lot on the corner of La Cienega and Centinela in the city of Inglewood, California [R. T. 137, 139]. At that time the informant was told by Alan Oelke that the latter's brother, appellant John Oelke, was engaged with Alan Oelke in the sale of marihuana [R. T. 145]. Brucker told Alan Oelke that he desired to purchase twenty-five kilograms of marihuana [R. T. 145], and it was agreed that Brucker should call Alan Oelke or John Oelke on June 15 or June 16, 1966, between five and six o'clock p. m., to arrange for delivery of the marihuana [R. T. 146].

On June 15, 1966, Brucker telephoned the number of the apartment where appellant John Oelke and Alan Oelke resided [R. T. 147]. Brucker spoke to both John Oelke and Alan Oelke on the telephone. John Oelke asked Brucker whether he wanted to pick up marihuana that night [R. T. 149], and Alan Oelke agreed with Brucker to sell Brucker twenty-five kilograms of marihuana at about seven o'clock p. m. at or near the Oelkes' apartment on the following night, June 16, 1966 [R. T. 150]. This telephone conversation was monitored and overheard by Federal Narcotics Agent Harrison D. Paulus [R. T. 478-481].

At about 7:05 p. m. on June 16, 1966, Brucker, who had been given $1, 950 in Government funds to make the purchase from

the Oelkes [R. T. 154], drove to the vicinity of the Oelkes' apartment, which was located at 7102 La Cienega, Apartment 4, near the intersection of La Cienega and Glenway in Inglewood [R. T. 154]. Brucker saw John Oelke and Alan Oelke standing in the driveway in front of a garage on Glenway, which adjoined the apartment building where the Oelkes resided [R. T. 155]. John Oelke came over to Brucker's car and told Brucker to come with him to the Oelkes' nearby apartment to wait while Alan Oelke obtained the marihuana [R. T. 156]. Brucker and John Oelke then went to Apartment 4, 7102 La Cienega, where they were joined in several minutes by Alan Oelke [R. T. 156]. Between the time when Brucker and John Oelke went to the apartment and the time when Alan Oelke joined them, appellant Leon T. Graves approached the garage carrying a cardboard box and met with Alan Oelke [R. T. 219-220]. This box was later identified as then containing 21,234.3 grams of marihuana. Appellant Graves and Alan Oelke entered the garage, Graves still carrying the box, then exited in a moment empty-handed and closed the garage door [R. T. 221, 224].

When Alan Oelke had joined Brucker and John Oelke in the apartment, Alan Oelke told Brucker that he had the marihuana ready for delivery and asked for the purchase money [R. T. 156]. Brucker objected, stating that Alan Oelke would only be paid on delivery of the marihuana [R. T. 157]. Brucker and Alan Oelke then went downstairs to the garage on Glenway [R. T. 157]; Alan Oelke opened the door of the garage and showed Brucker the

marihuana contained in the box which Graves had brought [R. T. 158]. Brucker went out and got his car, then backed the car up to the garage door. He alighted, returned to the garage, and began to examine and count the bricks of marihuana contained in the box, making a small slit in the paper covering of each brick as he counted [R. T. 159]. At that time, when Brucker had counted twelve or thirteen bricks, federal agents entered the garage and placed both Alan Oelke and Brucker under arrest [R. T. 159].

During all of the events recounted above which occurred on June 16, 1966, Brucker was equipped with a Kell transmitter which had been placed on his person by Federal Bureau of Narcotics Agents, and by means of this transmitter agents were able to overhear the conversations of Brucker with John Oelke and Alan Oelke. This was testified to by Federal Narcotics Agent Joseph E. Kruger [R. T. 208-209] and Theodore J. Yanello [R. T. 314].

At approximately 7:25 P. M. on June 16, 1966, which was about the time when Alan Oelke and Brucker were placed under arrest in the garage, a federal agent entered Apartment 4 at 7102 La Cienega, where John Oelke had remained, and placed John Oelke under arrest [R. T. 426]. At that time John Oelke was hiding in a closet in his bedroom in the apartment. The agent who arrested John Oelke found in the same closet, at the time of the arrest, 2,734.065 grams of marihuana contained variously in a shoe box, a glass jar, and a tin can [R. T. 426-428].

V

ARGUMENT

A. APPELLANTS WERE NOT PLACED IN DOUBLE-JEOPARDY WITHIN THE CONTEMPLATION OF THE DOUBLE-JEOPARDY PROVISION OF THE FIFTH AMENDMENT BY VIRTUE OF THE IMPANELLING OF TWO SUCCESSIVE JURIES AT THEIR TRIAL IN THE COURT BELOW.

As is set forth in Section I of this brief, supra, the action involving appellants below was called for jury trial on August 2, 1965 [C. T. 33, 62]. At that time there were five defendants to be placed on trial: Gary Lee Tronmpeter, Gary Charles De Jong, Alan Oelke, and appellants John Oelke and Leon T. Graves. Prior to empanelling of the jury, defendant Tronmpeter changed his plea to guilty. Defendant De Jong then moved unsucessfully for a severance of his trial from that of the other defendants. In support of his motion for such severance, counsel for De Jong made the following statement [R. T. 18]:

> "MR. HARRIS: I want to point out to the Court that when the case goes to trial, it appears that the defendants will be Gary Charles De Jong and John Edward Oelke and that Mr. De Jong is charged with offenses happening on June 7, 1965, and John Oelke is charged on June 16 or 17, 1965, involving different times, different places, and as far as my client is concerned, a very large and different amount of

marihuana. I think it is distinctly to the prejudice of Mr. De Jong to be tried along with Mr. John Oelke. . . ."

On August 2, the Court denied Mr. De Jong's motion for severance, without prejudice [R. T. 21]. Thereafter, a jury was impanelled and sworn to try the four defendants who remained after Tronmpeter had entered his guilty plea [R. T. 26-44].

Subsequent to the impanelling of this jury, defendant Alan Oelke entered a plea of guilty [R. T. 57]. As the Indictment below shows, Alan Oelke was the only defendant whose alleged criminal acts were related to those of defendant De Jong on the one hand and to those of appellants John Oelke and Leon T. Graves on the other hand.

On August 3, 1965, subsequent to the impanelling and swearing of the jury but prior to the swearing of the first witness at the trial, defendant De Jong renewed his motion for severance of his trial from the trial of appellants. The Court then granted this motion for severance, and the jury already impanelled and sworn for the trial of four defendants was used to try De Jong alone [R. T. Supplement covering August 3, 1965 proceedings, 4-14].

The Court then proceeded, on August 4, 1965, to impanel and swear a second jury for the trial of appellants Oelke and Graves. Appellants' trial then proceeded on and after that date.

Based upon the foregoing, appellants make the following contentions upon this appeal:

That when the first jury was sworn for appellants' trial jeopardy attached for the first time; that when the second jury was sworn appellants were placed in jeopardy a second time for the same offense upon the same indictment; and that therefore appellants were placed twice in jeopardy in contravention of their rights under the Fifth Amendment to the United States Constitution.

The Fifth Amendment provides:

> " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . . "

Appellants in their respective briefs point to the general rule that jeopardy attaches in a jury trial once the jury has been impanelled and sworn.

Crawford v. United States, 285 F. 2d 661 (D. C. Cir. 1960);

Hunter v. Wade, 169 F. 2d 973, 975 (10 Cir. 1948);

Himmelfarb v. United States, 175 F. 2d 924 (9 Cir. 1949);

United States v. Narvaez-Granillo, 119 F. Supp. 556 (S. D. Cal. 1954).

Appellants' reason that, since jeopardy attached upon the swearing of the first jury, a second or double jeopardy attached upon the swearing of the second jury and subsequent proceedings violated the Fifth Amendment and are void. For appellants, this is the end of the matter; under the law, however, it is only the beginning.

As the United States Supreme Court pointed out in Wade v.

Hunter, 336 U.S. 684, 688-689 (1949):

> "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. . . .
>
> "When justice requires that a particular trial be discontinued is a question that should be decided by persons conversant with factors relevant to the determination. . . ."

Where legal necessity of various types impinges upon a trial which has begun with one jury, that jury may be discharged and a second jury impanelled and sworn without a violation of the Fifth Amendment resulting. This rule of law, discussed hereinafter, has been inbedded in American constitutional law since it was first expounded by the United States Supreme Court in United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). The present case, where the first jury was discharged in order to afford the benefits of a separate trial and substantial justice to Gary Charles De Jong, is clearly an appropriate one for the application of this rule.

Concerning the circumstances under which a defendant may properly be tried by a second jury subsequent to discharge of a

first, previously sworn jury in his case, a relatively recent opinion of the United States Supreme Court is clearly in point. The case of Gori v. United States, 367 U. S. 364 (1961) presents many striking similarities to the case at bar. In that case the petitioner, Gori, was accused of receiving stolen goods in violation of Title 18, United States Code, Section 659. On the first day of Gori's trial, during the examination of the Government's fourth witness, the Court on its own motion withdrew a juror and declared a mistrial, dismissing the jury. Mr. Justice Frankfurter in his opinion in Gori states that the reasons for this action by the Court were unclear, but notes that the Court of Appeals had concluded on its review that the trial judge was acting according to his convictions in protecting the rights of the accused when he dismissed the jury. It should be carefully noted that in the case at bar, unlike Gori, the judge's reason for discharging the first jury is clear from the record: it was to provide substantial justice to all defendants by providing a separate trial for defendant Gary Charles De Jong [R. T. Supplement covering proceedings of August 3, 1965, 4-14].

In Gori a second jury was impanelled and sworn after the discharge of the first. At this second trial Gori was convicted. On petition to the Supreme Court, Gori made a contention identical to that of the appellants in the case at bar: that the second trial violated the rule against double-jeopardy because jeopardy had once previously attached to him at his first trial. The Supreme Court rejected this contention and affirmed Gori's conviction.

Mr. Justice Frankfurter wrote (367 U. S. at 367-368):

> "Since 1824 it has been settled law in this Court that 'the double-jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment' (citing cases). . . . Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment."

Whether to grant a severance for trial is, it should be noted, a matter peculiarly within the discretion of the trial judge.

> Opper v. United States, 348 U. S. 84, 95 (1954);
>
> United States v. Stein, 140 F. Supp. 761, 765-766 (S. D. N. Y. 1956), and cases cited therein.

The Court below made its intelligent decision that the ends of substantial justice would best be served by trying appellants John Oelke and Graves separately from defendant Gary Charles De Jong after defendant Alan Oelke had pleaded guilty. Thus, under the authority of Gori, it should be found that appellants were not subjected to unconstitutional jeopardy.

The argument put forth by appellants is an arid and scholastic one. Appellants do not even contend that the impanelling of two successive juries for their trial resulted in any prejudice to them. On the record, it is clear that there was no such prejudice. Yet, because the first jury was discharged before a shred of oral evidence had gone in (unlike Gori, supra, where four witnesses had been heard from), appellants now demand a reversal. The law provides no such windfall to persons convicted of crime.

Some of the forms of legal necessity which justify a court in discharging a jury and ordering a subsequent trial without consequent unconstitutional double jeopardy are: the case where the first jury is unable to agree, United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Logan v. United States, 144 U.S. 263 (1892); the case where the trial judge discovers that a juror was disqualified and sua sponte dismisses the jury, Thompson v. United States, 155 U.S. 271 (1894); the case where the trial judge discovers that a juror was biased and likewise sua sponte dismisses the jury, Simmons v. United States, 142 U.S. 148 (1891); and the case where, at a military court-martial, the commission is withdrawn from one court and given to another because of military necessity, Wade v. Hunter, 336 U.S. 684 (1949). It is submitted that the necessity to furnish a separate trial to defendant De Jong in the case at bar is likewise a sufficient basis on which to invoke the rule.

The Ninth Circuit Court of Appeals has adopted the foregoing rules in toto. In the case of Himmelfarb v. United States,

175 F. 2d 924 (9 Cir. 1949), the trial judge granted a mistrial on motion of one of the two defendants as a result of an improper remark by the prosecutor in opening statement. The other defendant thereupon moved for dismissal and that a plea of once in jeopardy be entered. The Court denied the motion, and another jury tried and convicted the defendants. On appeal the moving defendant argued that the latter ruling was error and that the defendant had been placed twice in jeopardy. The Court of Appeals rejected this contention, holding that a legal necessity had existed for the impanelling of the second jury:

> " . . . 'in the federal courts the recognized rule is that discharging a jury before verdict in a matter within the sound discretion of the trial court . . . a defendant who pleads double jeoparcy has the burden of proving abuse of such discretion. United States v. Potash, 2 Cir., 118 F. 2d 54, 56, certiorari denied, 313 U. S. 584' . . . ."

Just so in the present case: unless this Court can find that an abuse of discretion occurred when the Court below granted a severance for trial, it should affirm the judgment of conviction.

As to the abstract question of whether, as a matter of legal theory, jeopardy with respect to the first jury is deemed nullified when the jury is discharged, or whether jeopardy is deemed not to have attached at all, it is submitted that this question is not truly germane to the case at bar. Indeed, this abstract question has not been finally determined, nor need it be in the course of deciding

this appeal.

See: Crawford v. United States, 285 F. 2d 661, 662 (D. C. Cir. 1960).

Numerous other opinions of the federal appellate courts uphold the rule that a defendant may be retried without unconstitutional double jeopardy resulting in cases where the first jury was discharged because of a legal necessity.

United States v. Miguel, 340 F. 2d 812 (2 Cir. 1965);

Killelea v. United States, 287 F. 2d 212 (1 Cir. 1961);

Crawford v. United States, 285 F. 2d 661 (D. C. Cir. 1960);

Brewster v. Swope, 180 F. 2d 984 (9 Cir. 1950).

The statement of this rule by the Court of Appeals for the District of Columbia Circuit in Pratt v. United States, 102 F. 2d 275, 280 (D. C. Cir. 1939) is especially appropriate:

> "There is no better settled rule than that courts of justice may discharge a jury and order subsequent trial with no right in the defendant to contend that his constitutional rights have been invaded. This action has been taken in the past for many reasons that have manifested themselves, and will be taken in the future for many other proper reasons which will manifest themselves, in the administration of justice."

The cases of Downum v. United States, 372 U. S. 734 (1963), and Cornero v. United States, 48 F. 2d 69 (9 Cir. 1931), do not compel or even suggest a result favorable to appellants on the double jeopardy aspect of this case. Those two decisions hold that a defendant may not be retried by a second jury where the first jury has been discharged as a convenience to the prosecution, because prosecution witnesses have been unavailable when the first jury was impanelled and sworn. We do not have that case here. The Government's counsel did not press for De Jong's severance for trial in the court below, and in fact initially opposed it [R. T. 20]. No purpose of the Government was served, or could have been served, by the severance.

In view of the foregoing authorities, it is submitted that neither appellant John Oelke nor appellant Graves was exposed below to double jeopardy in violation of the Fifth Amendment to the United States Constitution.

B. THERE WAS NO ILLEGAL SEARCH OR SEIZURE IN APPELLANT JOHN OELKE'S APARTMENT AT THE TIME OF HIS ARREST ON JUNE 16, 1965, AND EVIDENCE OBTAINED AT THAT TIME BY OFFICERS WAS PROPERLY ADMITTED IN EVIDENCE.

Appellant John Oelke, for himself alone, raises in his brief on appeal the contention that at the time of his arrest the arresting officers unlawfully seized marihuana from the scene of his arrest. This marihuana, 2734.065 grams in weight, which was described

as two bags of marihuana (containing 6 plastic bags and cans) plus 2 bricks (kilos) of marihuana, was identified and received at the trial below as Government's Exhibit Number 3 in evidence [C. T. 29]. Appellant John Oelke specifies as error the admission of this evidence at his trial.

John Oelke was arrested on June 16, 1965, at approximately 7:30 p. m., by Agent Charles D. Sherman of the Federal Bureau of Narcotics. The arrest occurred in Apartment 4, 7102 La Cienega Boulevard, an apartment which John Oelke and members of his family, including his brother, Alan Oelke, occupied as a residence [R. T. 426-438].

At the trial below, Agent Sherman testified as to the circumstances of John Oelke's arrest [R. T. 426-438].

We must first inquire whether there was probable cause for the arrest of appellant John Oelke. Agent Sherman testified at the trial, with respect to probable cause, as follows: prior to the arrest, he was advised by Agent Harrison D. Paulus that on August 15, 1965, informant Brucker had placed a phone call to the Oelke residence and had made arrangements for the purchase of marihuana to take place on August 16, 1965 [R. T. 447]. On August 16, Agent Sherman was advised by other agents on the radio that a team of narcotic agents had observed Brucker meet with John Oelke on Glenway in the vicinity of the Oelke apartment and that the two had entered the apartment and had a conversation which was monitored by the agents [R. T. 447]. Agent Sherman was further advised by radio on August 16 that Alan Oelke and

appellant Graves had made a delivery of marihuana to Brucker in the garage on Glenway near the apartment [R. T. 448]. Agent Sherman then entered the apartment, where he found John Oelke in a closet in the bedroom [R. T. 426]. Agent Sherman found in the same closet, at the time of the arrest, 2,734.065 grams of marihuana which later became Government's Exhibit 3 at the trial below [R. T. 426-428].

It is submitted that these facts speak for themselves and that probable cause for the arrest of John Oelke was present at the time when Agent Sherman arrested him. It is well established that hearsay evidence (such as the information which Agent Sherman received from the other agents) is admissible on the question of probable cause to arrest.

Ker v. California, 374 U.S. 23, 36 (1963);
United States v. Miguel, 340 U.S. 812, 814 (2 Cir. 1965).

These reports, given to Agent Sherman by other agents including Agent Paulus on August 15 and 16, 1965, would support a reasonable belief on Agent Sherman's part that John Oelke was then engaged with his brother Alan in a set of acts designed to result in a sale of marihuana to informant Brucker. Thus, the arrest of John Oelke was supported by probable cause and was lawful.

Given that the arrest of John Oelke was lawful, it clearly follows that the search and seizure of the 2,734.065 grams of marihuana found in the closet with John Oelke were lawful. For the search was contemporaneous with the arrest as to both place

and time. It follows also that possession of this contraband by John Oelke may be shown, by means of Agent Sherman's testimony hereinabove cited, to support the conviction of John Oelke of the offense charged in Count Eight of the Indictment.

Agnello v. United States, 269 U.S. 20 (1925);

Marron v. United States, 275 U.S. 192 (1927);

United States v. Lefkowitz, 285 U.S. 452 (1932);

Abel v. United States, 362 U.S. 217, 237 (1960).

Indeed, the search of an entire residence incident to a valid arrest has been upheld.

Harris v. United States, 331 U.S. 145 (1946).

> "Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime . . . . This right to search and seize without a search warrant extends to things under the accused's immediate control, . . ., and, to an extent depending on the circumstances of the case, to the place where he is arrested. . . . The rule allowing contemporaneous searches is justified, for example, . . ., by the need to prevent the destruction of evidence of the crime . . . ." Preston v. United States, 376 U.S. 364, 367 (1964).

It is evident on the facts of this case that, if Agent Sherman had not seized the marihuana from the closet when he arrested John Oelke, the marihuana could easily have been secreted or destroyed. The acts of Agent Sherman in seizing the marihuana, which was in John Oelke's possession and control, were not only lawful, but necessary as well.

See: United States v. Ventresca, 380 U.S. 102, 106-107 (1965).

Accordingly, it is submitted that the marihuana taken from the closet where appellant John Oelke was arrested was not the product of unlawful search and seizure, and was properly admitted into evidence at trial.

CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael Heuer

MICHAEL HEUER